APPEAL NO. 93404

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). At a contested case hearing held in (city), Texas, on April 21, 1993, the hearing officer, (hearing officer), determined that the severance pay which the respondent's (claimant) employer paid to her upon the closing of its plant was not "wages" as defined by Article 8308-1.03(47), nor "weekly earnings after the injury" as described in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.1(1) (Rule 129.1(1)), and that the appellant (carrier) could not reduce claimant's temporary income benefits (TIBS) by any amount as the result of claimant's having received the severance pay. In its request for review, the carrier asserts error by the hearing officer in concluding that the carrier may not consider severance pay as "wages" or as "weekly earnings after the injury" for purposes of calculating claimant's TIBS. The claimant urges our affirmance.

DECISION

Finding the hearing officer's decision to be sufficiently supported by the evidence and to be a correct application of the law, the decision is affirmed.

The sole disputed issue before the hearing officer, as agreed to by the parties, was whether or not the severance pay from April 3, 1992, through June 1, 1992, received by the claimant, is considered weekly earnings after the injury thereby reducing the carrier's obligation to pay TIBS during that period of time. The parties called no witnesses and stipulated to the following facts: that claimant was an employee of (employer) through April 16, 1992, at the time the plant closed; that as of April 3, 1992, claimant's lost time began, related to claimant's compensable injury in this matter; that the present status of the underlying workers' compensation claim is that claimant is in on off-work status, and is receiving TIBS and medical benefits related to her injury; that the (plant) closed on April 16, 1992; that following April 16, 1992, claimant performed no work activities at the plant; that claimant did receive severance pay from her employer following April 16, 1992, in an amount of six or eight weeks; that during this period of time, following April 16, 1992, claimant performed no personal services in exchange for being paid wages from employer; and that no TIBS were paid by the carrier prior to June 12, 1992. In addition to these stipulated facts, the carrier introduced an Employer's Supplemental Report of Injury and an Employer's Wage Statement (TWCC-3).

The record was not developed concerning the rationale for the employer's payment of severance pay to claimant and her coworkers upon the closing of the plant and we do not know whether it was based upon claimant's employment contract, or was the result of a management decision made at the time the employer decided to close the plant, or had some other basis. Nor was the record developed respecting when claimant's employment relationship with employer ceased although the parties did stipulate that claimant was an employee "through April 16, 1992, at the time the plant closed." The TWCC-3 form in evidence stated claimant's date of injury as "2-10-92" and showed her weekly

"salary/wages" for the 13 week period from "11-1-91 through 2-6-92." In Item 13 on that form, entitled "Fringe Benefits," the employer listed "vacation/holidays" as "included in wages," and showed claimant's only other fringe benefit as health insurance in the amount of $42.29. Severance pay is not included in the list of 13 fringe benefits on the form and the employer did not include such in the fringe benefit category entitled "other" at the bottom of the list.

With regard to the amount and calculation of claimant's severance pay, as noted above the carrier introduced a form entitled "Employer's Supplemental Report of Injury." That form contained the following information on the calculation of claimant's severance pay: "Plant closed 4/16/92. Associate will receive 8 wks of separation pay, calculated at a one year weekly average: $6.78 per hr X 40 hours = $271. 20 weekly starting week ending 4/23/92 until 6/11/92." This information conflicts with the disputed issue as framed at the benefit review conference (BRC) and repeated by the hearing officer in that it indicates claimant's severance pay commenced the day following the plant's closure on April 16, 1992, and was paid for eight weeks whereas the disputed issue had the severance pay running from April 3rd through June 11th. It was on April 3rd that

claimant's lost time from her injury began according to the stipulated facts. Neither party has mentioned this misstatement on appeal and we regard it as harmless error.

At the BRC the claimant's position was that TIBS are due her because the severance pay should not be considered as weekly earnings since it was paid due to the closing of the plant, while the carrier's position was that claimant was not due any TIBS because her postinjury earnings exceeded her preinjury average weekly wage (AWW). The carrier's attorney, in argument, stated that "[i]n this case, the severance pay exceeded the preinjury average weekly wage" and argued such as a basis for there being no TIBS due claimant for the period she received the severance pay. Claimant's attorney countered with the argument, among others, that since the severance pay exceeded claimant's wages, it was not calculated based on claimant's wages and should not be considered a part of her wages under the 1989 Act.

Given that the evidence concerning the amount of the severance pay and the period for which it was paid was contained in the Employer's Supplemental Report of Injury, we note the provisions of Article 8308-5.05 to the effect that the employer's written report of injury filed with the Texas Workers' Compensation Commission (Commission) and the carrier may not be considered admissions or evidence against the employer or the carrier in any proceeding before the Commission or a court in which the facts set out in that report are contradicted by the employer or the carrier. In this case, however, not only did the carrier introduce the employer's supplemental report, and not only were the facts contained therein concerning the severance pay not contradicted by the employer or carrier, but it was the carrier who first mentioned and relied on the severance pay information in that report. Under these circumstances, we do not regard our consideration of the severance pay information in that document to be proscribed by Article 8308-5.05.

Since claimant's compensable injury was not in dispute, the carrier is liable for compensation for her injury including income benefits. Articles 8308-1.03 (11), 8308-1.03 (26), 8308-3.01, and 8308-4.21. An employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits (TIBS) which accrue beginning on the eighth day of disability and which are to be paid weekly. Articles 8308-1.03 (16), 8308-1.03 (32), and 8308-4.23 (a) and (b). Article 8308-4.23 (c) provides that TIBS are payable at the rate of 70% of the difference between the employee's AWW and the employee's "weekly earnings after the injury," with provisions for maximum and minimum weekly benefits. Article 8308-4.23(d) increases the TIBS rate to 75% of the difference between the AWW and the "weekly earnings after the injury" for employees who earn less than $8.50 per hour.

The sole question involved in this appeal is whether the severance pay which employer paid to the claimant constituted wages and it seems to us that since it was the carrier who contended that claimant's severance pay constituted wages, the burden was on

the carrier to prove it. The determination of that question requires a construction of the applicable provisions of the 1989 Act and the Commission's Rules. The term "wages" is defined by Article 8308-1.03(47) thusly:

> "Wages" includes every form of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and other advantage that can be estimated in money which the employee receives from the employer as part of the employee's remuneration." (Emphasis supplied.)

Rules 128.1(b) and (c) provide as follows:

> (b)An employee's wage, for the purpose of calculating the [AWW] shall include every form of remuneration paid for the period of computation of [AWW] to the employee for personal services. An employee's wage includes, but is not limited to:
>
> (1)amounts paid to the employee by the employer for time off such as holidays, vacation, and sick leave;
> (2)the market value of any other advantage provided by an employer as remuneration for the employee's services that the employer does not continue to provide, including but not limited to meals, lodging, clothing, laundry, and fuel; and
> (3)health care premiums paid by the employer.
>
> (c)An employee's wage, for the purpose of calculating the [AWW], shall not include:
>
> (1)payments made by an employer to reimburse the employee for the use of the employee's equipment or for paying helpers; or
> (2)the market value of any non-pecuniary advantage that the employer continues to provide after the date of injury. (Emphasis supplied.)

Rule 129.1(1) provides as follows respecting the calculation of TIBS:

> "Weekly earnings after the injury" means the weekly amount of all pecuniary and non-pecuniary remuneration paid or provided to the employee as wages, as that term is defined in the Act, § 1.03 (47), beginning on the day after the injury and continuing through the temporary income benefit period. Weekly earnings after the injury excludes the fair market value of non-pecuniary wages throughout the period that an employer continues to provide them after an injury, whether or not the employee is working.

We note that "wages" is also defined by the Texas Unemployment Compensation Act. TEX. REV. CIV. STAT. ANN. art. 5221b-17(n) defines "wages" to mean "all remuneration paid for personal services, including the cash value of all remuneration paid in any medium other than cash and gratuities received by any employee in the course of employment to the extent that the gratuities are considered as wages in the computation of taxes under the Federal Unemployment Tax Act, ..." However, this definition provides that the term "wages" does not include payments to or on behalf of an employee made on account of a number of specified purposes such as retirement, sickness or accident disability, medical or hospitalization expenses in connection with sickness or accident disability, bond purchase plans, annuity plans described in Section 403(a) of the Internal Revenue Code of 1954, and so forth.

In his discussion of what is included in "wage" for the calculation of AWW, Professor Larson cites no cases respecting severance pay, notes the split among the authorities respecting the inclusion of various fringe benefits such as those in the 1989 Act's definition, and says that "unemployment compensation is generally excluded." 2 Larson's Workmen's Compensation Law §60.12(b) (1992). The carrier in its well written brief supporting its request for review advises that no Texas cases were found on point. The carrier does cites us to the definition of "wages" in Black's Law Dictionary (which includes "dismissal wages" but not severance pay) and to a Florida case (Coleman v. City of Hialeah, 525 So. 2d 435 (Fla. App. 3 Dist 1988)) where a police officer, having successfully recovered in an action for an increase in long-term disability benefits, sought to recover attorney's fees under a statute allowing the award of attorney's fees to the prevailing party in an action for "unpaid wages." The lower court held that the officer's action for disability benefits was not an action for unpaid wages and the appellate court affirmed. In its opinion, the Florida court cited a Florida statute which defined wages in a manner not dissimilar to that in Article 8308-1.03 (47) and which did not mention severance pay but did include "dismissal pay."

In its discussion of the statute, the Florida court observed: "Central to these definitions and the results reached in the above cases is that the term "wages" involves some compensation paid to an employee for services rendered to his employer. Broadly read, this definition embraces salaries, commissions, bonuses, vacation pay, and severance

pay." The court distinguished benefits which it viewed as forms of remuneration for services rendered an employer by an employee, such as salaries, commissions, vacation pay, dismissal wages, bonuses, tips, the reasonable value of board and rent, and so forth from benefits the court viewed as being in the nature of "a social security type scheme" such as pension benefits, workers' compensation benefits, employment disability benefits, sick leave benefits, or unemployment benefits which "are not considered 'wages' in the commonly accepted use of that term as defined above." The latter type benefits, the court reasoned, are provided "because of a perceived societal or moral obligation to financially assist an employee when he or she is unable to work because of old age, employment-related accidents or physical disabilities, sickness or layoffs. It is thought uncivilized in a highly complex modern economy to throw employees out of work with no money whatever when they are permanently or temporarily non-productive or unneeded on the job due to forces beyond their control." Coleman, *supra* at 437. (Emphasis supplied.) Following that rationale, the Florida court said that an action to recover those types of benefits is not an action for unpaid wages.

In the apparent absence of guidance from the Texas courts, we are persuaded that the solution is found in looking to the reason the severance payments to claimant were made, that is, was the severance pay provided for services rendered, or because the plant was closed and the employer did not want to turn its employees out on the street unemployed with no additional benefit, or for some combination of reasons. We are constrained to view the term "wages," as defined in the 1989 Act and Commission Rules, to have excluded the severance pay provided to claimant under the particular circumstances of this case. According to the stipulated facts, the severance pay was provided at a time when the claimant performed no personal services for the employer, the employer's plant was closed, and the claimant's employment relationship had apparently ended.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e). We do not substitute our judgement for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App. - Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust.

In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

Finding the evidence sufficient to support the hearing officer's decision, we affirm.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Thomas A. Knapp
Appeals Judge